

**WASPA appeals panel
Complaint 9691**

REPORT OF THE APPEALS PANEL

Date: 21 November 2011

Service Provider: VIAMEDIA

Information Provider (IP): RASCO PRODUCTIONS

Appellant: VIAMEDIA

Complaint Number: 9691

Applicable versions: 9.0

1. BACKGROUND TO THE APPEAL

1.1 This appeal concerns a complaint lodged on 8 June 2010 against the SP.

1.2 The SP is a full member of WASPA. The IP is not a member of WASPA.

1.3 The Complaint relates to an alleged unsolicited message of pornographic nature.

1.4 The complaints, the findings of the Adjudicator, the SP's response to and appeal against the complaint, are fully recorded in the case files provided to this appeals panel, and as these are, or will be, publicly available on the WASPA website, they will not be repeated in full in this appeal panel's report.

2. CLAUSES OF THE CODE CONSIDERED

2.1 The following clauses of the Code were considered:

3.9.1. Members must bind any information provider with whom they contract for the provision of services to ensure that none of the services contravene the Code of Conduct.

3.9.2. Where any information service provider that is not a WASPA member conducts any activity governed by the provisions of this Code, and makes use of the facilities of a WASPA member to do so, that member must ensure that the information service provider is made fully aware of all relevant provisions of the Code and the member shall remain responsible and vicariously liable for any breach of the Code resulting from the actions or omissions of any such information service provider.

3.9.3. A WASPA member shall, by obtaining the information provider's signature on the WASPA template agreement, be deemed to have taken all reasonable steps to ensure that the information provider is fully aware of the terms of the WASPA Code of Conduct and this shall be considered as a mitigating factor for the WASPA member when determining the extent of any possible liability for the breach of the provisions of the WASPA Code of Conduct as a result of any act or omission by the information provider.

5.1.7. Upon request of the recipient, the message originator must, within a reasonable period of time, identify the source from which the recipient's personal information was obtained.

5.2.1. Any commercial message is considered unsolicited (and hence spam) unless:

- (a) the recipient has requested the message;
- (b) the message recipient has a direct and recent (within the last six months) prior commercial relationship with the message originator and would reasonably expect to receive marketing communications from the originator; or
- (c) the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so.

5.3.1. Members will not send or promote the sending of spam and will take reasonable measures to ensure that their facilities are not used by others for this purpose.

5.3.2. Members will provide a mechanism for dealing expeditiously with complaints about spam originating from their networks.

3. FINDINGS AND DECISIONS OF THE ADJUDICATOR (Please note that this extract is a verbatim copy of the Adjudicator's Report)

3.1 It appears from the information and the absence of the extract of the Information Provider's database to confirm consent to receive the communication:

3.1.1 it cannot be established that **the complainant had requested the message; had a direct and recent prior commercial relationship with the Information Provider and would reasonably expect to receive marketing communications from the Information Provider; and**

3.1.2 that the *commercial communication* sent to the Complainant was indeed "spam" in terms of the definitions provided in Section 5.2 of the Code and as such was a contravention of Section 5.3 of the Code.

3.2 The receipt of such message was aggravated by the fact that the Complainant had, only 2 months prior to lodging this complaint, lodged a complaint against the SP with WASPA on a similar set of facts as are present in this case.

3.3 In respect of one of the complainant's main causes of complaint, being that he has not been provided with the source of his personal information, I make reference to Section 5.1.7 of the Code: "Upon request of the recipient, the *message originator* must, within a reasonable period of time, identify the source from which the recipient's personal information was obtained".

3.4 In these circumstances, Rasco Productions as the Information Provider and message originator, is obliged to provide the complainant with the source of his personal information. This to date has not been done.

3.5 That said, Rasco Productions is not a WASPA member nor an affiliate member at this time but Sections 3.9.1 and 3.9.2 of the Code provide that **in these circumstances ViaMedia is vicariously liable for the conduct of Rasco Productions and as such I am holding ViaMedia liable for the infringing conduct of Rasco Productions in this matter.**

3.6 **ViaMedia even note the fact that they bind Rasco to the Code of Conduct in their response to the Complainant.**

3.7 Further in respect of the assurances provided by ViaMedia to prevent future receipts by the complainant of such communications, I find that as an SP I would expect that they would indeed keep a “global opt-out list” to ensure that members of the public do not continually receive unwanted communications from the SP’s various customers.

3.8 The constitution of such list in itself does not provide a firm assurance as requested by the complainant that the complainant will not receive future communications of a similar nature.

3.9 I find that the SP has indeed breached sections (5.)1.7 and 5.3 of the Code of Conduct and in aggravation, note that similar complaints on a similar set of facts has been laid against the SP in the past.

3.10 I note that the SP has not terminated the services of the Information Provider notwithstanding that no assurance of the complainant’s consent to receive the communication has been received from the Information Provider.

3.11 I do not feel mitigation of sanctions is justified in these circumstances in terms of Section 3.9.3 as the SP has stated numerous times that it closely

monitors the conduct of its Information Providers and that the specific campaign is one offered by the SP to the SP's Information Providers.

3.12 Sanctions

3.12.1 The SP is:

3.12.2 (i) ***Ordered to confirm in writing to the WASPA Secretariat that the complainant's information has been placed on the SP's global opt-out list within five (5) days of date of notification of this Adjudication;***

3.12.3 (ii) *Ordered to provide the complainant with the source of the complainant's personal information and consent received by the Information Provider to send the communication in question to the complainant within five (5) days of date of notification of this Adjudication;*

3.12.4 (iii) ***Fined the sum of R15 000.00 payable to the WASPA Secretariat within five (5) days of date of notification of this Adjudication in the event of compliance with (i) and (ii) above;***

3.12.5 (iv) ***Fined the sum of R 35 000.00 payable to the WASPA Secretariat within ten (10) days of date of notification of this Adjudication in the event of non-compliance with either or both (i) and (ii) above; and***

3.12.6 (v) *The termination of the services to the Information Provider, Rasco Productions in the event of the SP's failing to receive from the Information Provider: the source of the complainant's personal information and the consent received by the Information Provider to send the communication in question to the complainant.*

4. GROUNDS OF APPEAL

4.1 Grounds of appeal for complaint 9450

4.1.1 The Appellant submitted detailed grounds of the complaint which will not be re-canvassed in full here.

4.1.2 In its appeal it questioned the Adjudicator's findings and formed the opinion that the Adjudicator erred in its findings.

4.1.3 The main allegation of the Complainant as to where his information was acquired from and the Adjudicator's subsequent finding thereon was disputed.

4.1.4 It further stated that the Adjudicator's allegation of SPAM is ill-founded and provided proof of a prior commercial relationship with the Complainant.

4.1.5 It also contested the allegations levelled at its mechanisms for preventing and dealing with SPAM and provided an explanation of SPAM prevention and the current structures in place to deal expeditiously with complaints about SPAM arising from their networks.

5. FINDINGS OF APPEAL PANEL

5.1 Version of the Code

5.1.1 Version 9.0 of the Code, in use from 31 March 2010 to 13 October 2010, applies.

5.2 Decision

5.2.1 After having read the initial complaint, the SP's response, the subsequent adjudication and the Appeal by the SP, the Appeals Panel is aware of new evidence that have been submitted by the SP.

5.2.2 The evidence presented assume to indicate that the IP in this matter did in fact have a prior commercial relationship with the Complainant and that there was also evidence of a voice recording which indicated explicit consent on behalf of the Complainant.

5.2.3 It is however difficult to establish if the alleged consent, obtained through a partner (Digicall), extended to include marketing of any nature by third parties, such as the IP in this matter.

5.2.4 Without having seen an actual telephone transcript, the Panel only have the Appellant's word, in the form of a letter from the IP, available as proof of such alleged consent.

5.2.5 The Panel requested further proof but the SP in its reply indicated that it had ceased its business relationship with the IP, and that the IP thereafter ceased to exist as an entity, therefore making it impossible to obtain the requested information. The Panel is not satisfied with this explanation. The use of personal details is of such legal significance that the duty remains on the SP to be able to prove that the relevant permissions were obtained. Despite repeated chances to furnish same, the SP has failed to give any actual proof that the correct permissions were given.

5.2.6 Taking paragraphs 5.2.3, 5.2.4 and 5.2.5 into consideration the Panel cannot infer whether there was in fact explicit consent.

5.2.7 The Appeals Panel is also (refer to paragraphs 5.2.3, 5.2.4 and 5.2.5) not able to ascertain whether there was in fact a direct and recent (within the six months prior to the Complaint) prior commercial relationship between the **message originator** and Complainant and whether the Complainant would **reasonably expect to receive marketing communications from the originator**.

5.2.8 The Panel therefore finds that the message was indeed SPAM, due to the absence of sufficient proof (telephone script).

5.2.9 The Appeal Panel does not concur with the SP in this matter that the Adjudicator erred in its interpretation of section 5.1.7.

5.2.10 The SP in this matter did identify the source of the information and such source was communicated to the Complainant via the formal

response of the SP, **BUT ONLY 16 days later**, on the 24th of June 2010. Further information as to the source was requested and this was only given on the 23rd of August.

5.2.11 It is however contentious as to whom the term “**message originator**” can be attributed to, in this matter.

5.2.12 Section 2.16 states that a “**message originator**” is the entity sending a commercial message and can be any person with a commercial arrangement with a WASP to send commercial messages, or a WASP directly.

5.2.13 The Panel is of the opinion that the IP in this matter is the “**message originator**”.

5.2.14 Section 5.1.7 states that upon request of the recipient, the **message originator** must, **within a reasonable period of time**, identify the source from which the recipient’s personal information was obtained.

5.2.15 The IP took 1 month and 16 days to respond. This is not seen as within a reasonable period to identify the source.

5.2.16 Should the SP however argue that they (SP) were the “**message originator**”; then the Panel would still argue that 16 days are not considered by it as a reasonable period.

5.2.17 The Panel is however not in agreement with the Adjudicator’s decision as detailed in paragraph 3.11 regarding the application of section 5.3.1, if found to be relevant.

5.2.18 Section 3.9.3 states that a WASPA member **shall**, by obtaining the information provider’s signature on the WASPA template agreement, **be deemed to have taken all reasonable steps to ensure that the information provider is fully aware of the terms of the WASPA Code of Conduct** and **this shall be considered as a mitigating factor** for the WASPA member when determining the extent of any possible liability for

the breach of the provisions of the WASPA Code of Conduct as a result of any act or omission by the information provider.

5.2.19 The Code is therefore clear that this (Agreement with IP) is an indication that the SP is deemed to have taken **all reasonable steps** in terms of ensuring that the IP is in compliance with the Code and that such action shall be considered as mitigating circumstances.

5.2.20 Section 5.3.1 states that members will not send or promote the sending of spam and will take **reasonable measures** to ensure that their facilities are not used by others for this purpose.

5.2.21 It is not clear whether the steps taken in terms of section 3.9.3 would validate the reasonable measures referred to in section 5.3.1.

5.2.22 This Panel is of the opinion that if the SPAM originated from the IP, and the SP (Appellant) did have an agreement with the IP, as specified in section 3.9.3, then the SP (Appellant) has complied with the measures referred to section 5.3.1.

5.2.23 The Panel is also satisfied that the Appellant has dealt expeditiously with the allegation of SPAM, but is not satisfied that the expeditious resolve could be extended to the identification of the source (16 Days).

6. The finding of the Appeals Panel is:

6.1 The Panel finds that the Appellant is not in breach of section 5.3.1 and only finds the Appellant to be partially in breach of section 5.3.2

6.2 The Panel does however find the SP (Appellant) liable in terms of section 3.9.2 for the IP's various breaches of sections 5.1.7 and 5.2.1, which breaches have not been sufficiently rebuffed by the Appeal.

- 6.3 The Panel is however of the opinion that the Appellant's compliance with section 3.9.3 might under normal circumstances, justify mitigation.
- 6.4 However, that having been said, this Panel is of the opinion, that where a user has specifically opted out of a specific service (as in this case), irrelevant of the origin of the user's information, then such opt-out must be brought to the attention of the message originator (IP in this case) if an identical service is being provided to it by the SP (Appellant in this matter).
- 6.5 Even more so if a user has lodged a complaint with WASPA demanding an opt-out to the said service, and the SP (Appellant in this matter) then claims to have honoured the request.
- 6.6 In such an instance, and what has indeed happened in this matter, there can be no excuse and the Panel feels that the Appellant should have at least flagged the opt-out with the IP who could have performed a so-called de-dupe against its own database.
- 6.7 The Panel therefore agrees partially with the Adjudicator's application of section 3.9.3 in terms of section 3.9.2 as referred to in paragraph 3.11.
- 6.8 The Sanctions are therefore considered reasonably fair and mild.
- 6.9 Although the IP has ceased to exist as an organisation, the Panel does not feel that such factor should result in a mitigation of the fine.
- 6.10 The Sanctions are therefore upheld and the fine of R 35 000-00 is payable to the WASPA Secretariat within 7 (seven) days after receiving notice hereof.

The cost of appeal is non-refundable.